

## COMMENT

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### **Cutting Drag and Increasing Lift: How Well Will a More Competitive EEC Air Transport Industry Fly?**

Experience with deregulation of the United States airline industry has produced a number of unexpected consequences. As the European Economic Community (EEC) moves in the direction of increased competition within its air transport industry, this U.S. experience may be the best (if not the only) sounding board for predicting the success or failure of EEC proposals. This article compares and contrasts the two industries with respect to the effects attempts at increased competition within the EEC will have, while bearing in mind that the EEC and U.S. air transport industries are dissimilar in many social and economic respects. The article focuses on EEC or European Air Transport organizations only to the extent necessary for the discussion to remain clear and cohesive.

#### **I. History of European Air Transport**

##### **A. CHICAGO CONFERENCE ON INTERNATIONAL CIVIL AVIATION**

With World War II coming to a close, fifty nations gathered in Chicago in 1944 to enact an international air transport agreement.<sup>1</sup> While reaffirming the airspace

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1. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 3 Bevans 944, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

above each nation as sovereign (as adopted twenty-five years earlier in Paris<sup>2</sup>), the Chicago convention established "five freedoms of the air," whereby each signatory granted: (1) the privilege to fly across its territory without landing; (2) the privilege to land in its territory for nontraffic purposes; (3) the privilege to put down passengers, mail, and cargo taken on in the territory of the state whose nationality the aircraft possesses; (4) the privilege to transport passengers, mail and cargo destined for the territory of the state whose nationality the aircraft possesses; and (5) the privilege to transport passengers, mail and cargo destined for the territory of any other contracting state, and the privilege to put down the passengers, mail, and cargo coming from any such territory.<sup>3</sup>

Protectionism, however, as evidenced in both the Chicago and Paris conventions, ultimately limited the scope of the Chicago convention.<sup>4</sup> As such, the so-called "Five Freedoms Agreement," as a multilateral agreement, has proven ineffective, its purposes achievable only through separate, bilateral negotiations and agreements.<sup>5</sup>

#### B. THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

Despite the Chicago convention's ultimate inability to establish a multilateral organ for unrestricted air transportation, it did establish an international organization to address aviation matters. Focusing primarily on safety and operational concerns, the International Civil Aviation Organization (ICAO), while at times succumbing to politicism and protectionism, has been instrumental in raising and equalizing technical, safety, and operational standards between member countries.<sup>6</sup>

#### C. THE INTERNATIONAL AIR TRANSPORT ASSOCIATION

In 1945, the International Air Transport Association (IATA) was formed, with the coordination of international air traffic as one of its primary functions.<sup>7</sup> In the absence of a workable multilateral agreement among nations, the IATA developed bilateral agreements among carriers.<sup>8</sup> Over the years, the IATA has become

2. Paris Convention on the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173; Wassenbergh, *Regulatory Reform—A Challenge to Inter-Governmental Civil Aviation Conferences*, 11 AIR L. 31 (1986).

3. Chicago Convention, *supra* note 1, art. I.

4. D. KASPER, *DEREGULATION AND GLOBALIZATION: LIBERALIZING INTERNATIONAL TRADE IN AIR SERVICES* 47-48 (1988); Dagtoglou, *Air Transport and the European Community*, 6 EUR. L. REV. 335, 336 (1981).

5. Dagtoglou, *supra* note 4, at 336; D. KASPER, *supra* note 4, at 47.

6. D. KASPER, *supra* note 4, at 48.

7. Note, *New Frontiers in EEC Air Transport Competition*, 8 NW. J. INT'L L. & BUS. 455, 459 (1987).

8. D. KASPER, *supra* note 4, at 49.

one of the most influential of the world's airline organizations, composed of over 100 air carriers, including eleven of the twelve EEC members.<sup>9</sup>

#### D. EUROPEAN ECONOMIC COMMUNITY

The EEC was established in 1957, when six independent nations in western Europe entered into a treaty to promote economic expansion, higher standards of living, and closer relations among member countries.<sup>10</sup> Membership in the EEC is open to any European nation,<sup>11</sup> and the EEC has expanded three times since its inception.<sup>12</sup> The Treaty of Rome, establishing the EEC, created what have come to be known as the "Four Freedoms" of the EEC: free movement of goods, persons, services, and capital.<sup>13</sup> A major thrust of the EEC has been to create barrier-free internal markets and to prohibit anticompetitive practices within the EEC.<sup>14</sup> Of particular importance, article 3 of the Treaty of Rome seeks to: abolish obstacles to freedom of movement for persons, services and capital;<sup>15</sup> adopt a common policy for transportation;<sup>16</sup> institute a system to ensure that competition in the common market air transport industry is not distorted;<sup>17</sup> and establish procedures to coordinate and remedy disequilibria in balance of payments.<sup>18</sup> Analogous to the "constitution of the EEC,"<sup>19</sup> the Treaty of Rome established the three following independent EEC institutions:<sup>20</sup>

**The Council of Ministers.** The Council of Ministers is comprised of representatives appointed from each Member State, directly representing their own States' interests.<sup>21</sup> The Council of Ministers has both legislative and executive powers and is responsible for carrying out the objectives of the

9. Dempsey, *Aerial Dogfights Over Europe: The Liberalization of EEC Air Transport*, 53 J. AIR L. & COM. 615, 623 (1988).

10. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]. Original signatories: Belgium, France, Germany, Italy, Luxembourg, and The Netherlands.

11. *Id.* art. 237.

12. Denmark, Ireland, and the United Kingdom became members in 1973; Greece in 1981; and Portugal and Spain in 1986.

13. Treaty of Rome, *supra* note 10, arts. 48, 52, 59, 67; Dempsey, *supra* note 9, at 638; Toepke, *The European Economic Community—A Profile*, 3 NS. J. INT'L L. & BUS. 640, 643 (1981).

14. Treaty of Rome, *supra* note 10, art. 3; Sutherland, *The Competition Policy of the European Community*, 30 ST. LOUIS U.L.J. 149 (1985).

15. Treaty of Rome, *supra* note 10, art. 3(c).

16. *Id.* art. 3(e).

17. *Id.* art. 3(f).

18. *Id.* art. 3(g).

19. P. DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 242 (1987); Dempsey, *supra* note 9, at 641.

20. For a general discussion of basic EEC institutions and policies, see P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW (4th ed. 1985) [hereinafter MATHIJSEN].

21. 3 Common Mkt. Rep. (CCH) ¶ 4406.02 (1987); Dempsey, *supra* note 9, at 670; Toepke, *supra* note 4, at 647.

Community and coordinating the economic policies of the Member States.<sup>22</sup> To carry out these tasks, the Council of Ministers can issue binding directives, regulations, and decisions, as well as nonbinding recommendations and opinions.<sup>23</sup> Regulations automatically become EEC law upon their adoption, and are applicable to all Member States.<sup>24</sup> Directives and decisions are binding upon those Member States or enterprises to which they are addressed.<sup>25</sup> Of particular importance, title IV of the Treaty of Rome, addressing transport, tasks the Council of Ministers with developing and implementing a "common transport policy."<sup>26</sup>

**The Commission.** The Commission is a nonpartisan, "executive" body that acts independently, but functions closely with the Council of Ministers.<sup>27</sup> In very general terms, the duty of the Commission is to ensure the development of the EEC in conformity with the Treaty of Rome,<sup>28</sup> and administer and enforce areas of EEC law such as the Treaty's rules on competition.<sup>29</sup> To achieve these ends, the Commission, like the Council of Ministers, may issue regulations, directives, decisions, recommendations, and opinions.<sup>30</sup>

**The Court of Justice.** The European Court of Justice (ECJ) is comprised of judges selected from the Member States.<sup>31</sup> It interprets, enforces, and ensures the application of the provisions of the Treaty of Rome.<sup>32</sup> The ECJ's decisions have been of great importance in implementing EEC law and systematically eliminating many longstanding barriers to free movement within the EEC.<sup>33</sup> The ECJ can decide actions brought by the Commission, the Council of Ministers, a Member State, or an entity challenging the legality of regulations, directives, or decisions of the Commission or Council of Ministers.<sup>34</sup> The ECJ also has jurisdiction to give preliminary rulings concerning the interpretation of the Treaty of Rome, the validity and interpretation of acts of the institutions of the EEC, and interpretation of EEC legislation.<sup>35</sup> Additionally, the courts

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22. MATHUSEN, *supra* note 20, at 36; Dempsey, *supra* note 9, at 670; Toepke, *supra* note 13, at 647.

23. Treaty of Rome, *supra* note 10, art. 189; Dempsey, *supra* note 9, at 670; Toepke, *supra* note 13, at 648.

24. Toepke, *supra* note 13, at 648.

25. *Id.*

26. Treaty of Rome, *supra* note 10, art. 75.

27. *Id.* art. 155; 3 Common Mkt. Rep. (CCH) ¶¶ 4472, 4482 (1987); Dempsey, *supra* note 9, at 656; Toepke, *supra* note 13, at 645.

28. Dempsey, *supra* note 9, at 657; Toepke, *supra* note 13, at 645.

29. Treaty of Rome, *supra* note 10, arts. 9, 89(2), 90(3), 91(2), 93(2), 97; MATHUSEN, *supra* note 20, at 48.

30. Toepke, *supra* note 13, at 648.

31. Treaty of Rome, *supra* note 10, art. 167; MATHUSEN, *supra* note 20, at 56.

32. Treaty of Rome, *supra* note 10, art. 164; Toepke, *supra* note 13, at 649-50; 3 Common Mkt. Rep. (CCH) ¶ 4600 (1981).

33. Dempsey, *supra* note 9, at 650; Toepke, *supra* note 13, at 649.

34. Toepke, *supra* note 13, at 651.

35. Treaty of Rome, *supra* note 10, art. 177.

of Member States may refer a question raised in a national judicial proceeding to the ECJ for a preliminary ruling when no judicial remedy exists under national law.<sup>36</sup>

The Treaty of Rome, while containing provisions for establishing a common transport policy, expressly excluded air transport from the provisions set forth in title IV (Transport).<sup>37</sup> Historically, the IATA has been used to establish a "common" air transport policy, helping the carriers to establish agreements governing pricing, tariffs, and capacity.<sup>38</sup> As one commentator has suggested, the IATA has emerged to play a three-fold role, as: a cartel for airline pricing agreements; an international airline trade association; and a surrogate for a multinational governmental agreement.<sup>39</sup> As a result, the air transport industry within the EEC has remained extremely protectionistic and nationalistic, with ticket prices increasing steadily over the years in contrast to airline revenues that have not.<sup>40</sup>

The state ownership of airlines has been an important factor affecting regulation of the air transport industry, as the different EEC Member States and their respective airlines have different abilities to compete in the international air transport market.<sup>41</sup> Allowing the IATA to regulate prices has allowed for fares high enough to support even the most inefficient of these national carriers, while allowing national interests to remain prominent in determining Member State aviation policies and attitudes.<sup>42</sup> Characteristically, licenses and related prerequisites to engage in air transport have been granted exclusively by the national agencies, and reserved almost solely for national airlines, thus creating, in effect, national monopolies.<sup>43</sup>

In response to a system weighted in favor of nationalistic policies, inter-State interests have been balanced through bilateral negotiations covering market entry, capacity, and price conditions.<sup>44</sup> The freedoms articulated in the Chicago convention have existed only through the use of these supplemental bilateral agreements, and "freedom" to transport passengers, freight, and mail between third countries, as well as international airfares, are coordinated almost exclu-

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36. *Id.*; Toepke, *supra* note 13, at 651.

37. Treaty of Rome, *supra* note 10, art. 84, provides:

(1) The provisions of this Title shall apply to transport by rail, road, and inland waterway.

(2) The Council may, acting unanimously, decide whether, to what extent, and by what procedure appropriate provisions may be laid down for sea and air transport.

38. D. KASPER, *supra* note 4, at 49; Dempsey, *supra* note 9, at 623.

39. D. KASPER, *supra* note 4, at 49.

40. S. WHEATCROFT & G. LIPMAN, *AIR TRANSPORT IN A COMPETITIVE EUROPEAN MARKET 2* (1986); Bederman, *Prospects for European Air Deregulation*, 21 INT'L LAW. 561 (1987).

41. D. KASPER, *supra* note 4, at 50.

42. *Id.* For the effect inefficient carriers have had on overall fares and services, see Bederman, *supra* note 40, at 563.

43. S. WHEATCROFT & G. LIPMAN, *supra* note 40, at viii; Dagoglou, *supra* note 4, at 237.

44. Dagoglou, *supra* note 4, at 336-37.

sively through the IATA.<sup>45</sup> IATA coordination has produced a homogeneous system of regulating capacity and price, tied exclusively to the constraints of the carriers' bilateral agreements.<sup>46</sup> With policies that are violative of the Treaty of Rome's provisions on competition,<sup>47</sup> historically the IATA has been steadfastly opposed to a deregulated or liberalized European industry.<sup>48</sup>

While protectionism and the use of bilateral agreements has fostered higher prices, the IATA involvement has promoted a highly developed and reliable international air transport system.<sup>49</sup> In particular, it has made possible "interlining," whereby air tickets paid in the currency of one State are accepted by most airlines in the world.<sup>50</sup>

#### E. CHARTER AND NONSCHEDULED AIR SERVICE

At the other end of the spectrum, in response to restrictively high prices, charter airlines have operated in Europe under looser general licensing arrangements and with great success.<sup>51</sup> The very high proportion of European passenger traffic carried by charter, or nonscheduled services, is a feature that makes the European air transport industry unique.<sup>52</sup> The multilateral agreements affecting these nonscheduled or charter carriers have been much less restrictive than the bilateral agreements entered into by national or larger scheduled carriers.<sup>53</sup> The result has been a successful industry within an industry, not unlike the intrastate growth of PSA and Southwest Airlines, in California and Texas respectively, during the era of U.S. airline regulation.<sup>54</sup>

The IATA world air transport statistics for 1985 show that intra-European *scheduled* international traffic was 12 percent of the world's scheduled international traffic, while intra-European *nonscheduled* international traffic in the same year was 70 percent of the world's total of such traffic.<sup>55</sup> In the previous year, nonscheduled passenger traffic substantially exceeded scheduled traffic and accounted for more than 60 percent of the total passenger market for intra-

45. S. WHEATCROFT & G. LIPMAN, *supra* note 40, at 11; Note, *supra* note 7, at 459.

46. Dagtoglou, *supra* note 4, at 337; Note, *supra* note 7, at 459.

47. Dempsey, *supra* note 9, at 624.

48. *Id.* at 623; Forrest, *Is Open Competition Preferable to Deregulation?*, 6 AIR L. 7 (1981). Mr. Forrest, as then head of IATA Legal Department, touted the IATA as the only practical solution, disapproving of both competition and regulation.

49. Dagtoglou, *supra* note 4, at 337.

50. *Id.*

51. *Id.*

52. S. WHEATCROFT & G. LIPMAN, *supra* note 40, at 21.

53. See European Civil Aviation Conference (ECAC), International Agreement on the Procedures for the Establishment of Tariffs for Scheduled Air Services, 1967; ECAC Multilateral Agreement on Commercial Rights of Nonscheduled Air Services in Europe, Paris 1956; Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy and Public Policy*, 4 YALE J. ON REG. 393 (1987).

54. Levine, *supra* note 53, at 393, 401.

55. S. WHEATCROFT & G. LIPMAN, *supra* note 40, at 21.

European operations.<sup>56</sup> Whatever element of competition that exists within the EEC air transport industry, particularly with respect to travel on international routes, has, to a large extent, been made possible by means of bilateral agreements, as mentioned above, or through nonscheduled charter service.<sup>57</sup>

This mix of nationalism, protectionism, scheduled intra-European, and nonscheduled intra-European air traffic, however, results in an irregular European air transport industry when viewed in the aggregate.<sup>58</sup> The net result, even with the Chicago convention and its five freedoms of the air, is an industry that can be competitive in terms of customer service, but that is also overpriced, with a large portion of the so-called national airlines being subsidized by individual Member States in order to continue operations.<sup>59</sup>

## II. Recent Developments

Of late, there have been moves towards more privatization of the European airline industry.<sup>60</sup> For open commercial competition to thrive, however, the following aspects of the European air transport system must change: the principle of complete and exclusive sovereignty over territorial airspace will have to be weakened; individual States will have to be persuaded to relinquish control over routes, rights, fares, and rates; and the system of bilateral agreements that has for so long governed intra-European air transportation will have to be dismantled and a multilaterally binding regulatory system put into place.<sup>61</sup>

Over the last ten years, numerous proposals designed to encourage the Council of Ministers to establish a common transport policy have been presented.<sup>62</sup> The Commission has issued two memoranda, for the Council of Ministers' adoption, addressing the anticompetitive nature of EEC air transport, the unsatisfactory progress in developing a common transport policy, and outlining steps for improvement.<sup>63</sup> Memorandum 1<sup>64</sup> was issued in 1979, and

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56. *Id.*

57. Bentil, *Attempt to Regulate Restrictive Commercial Practices in the Field of Air Transportation Within a Transnational Antitrust Legal and Institutional Framework*, 50 J. AIR L. & COM. 69, 70 (1984).

58. Dagoglou, *supra* note 4, at 336-38.

59. S. WHEATCROFT & G. LIPMAN, *supra* note 40, at 29; Bederman, *supra* note 40, at 563.

60. S. WHEATCROFT & G. LIPMAN, *supra* note 40, at 29; Dempsey, *supra* note 9, at 618-19, 629-37.

61. Dempsey, *supra* note 9, at 682 ("Today Phillips, the Dutch electronics firm, can build a manufacturing facility in Barcelona with relative ease. But if KLM Royal Dutch Airlines sought to establish hub and spoke operations centered in Barcelona, the Spanish Air Force would likely be scrambled to escort the KLM jets out of sovereign Spanish air space."); Forrest, *supra* note 48, at 8, 11.

62. S. WHEATCROFT & G. LIPMAN, *supra* note 40, at 2-5.

63. MATHIJSEN, *supra* note 20, at 163; Dempsey, *supra* note 9, at 658.

64. *Air Transport: A Community Approach*, BULL. EUR. COMMUNITIES Supp. 5/79 (Memorandum of the Commission) [hereinafter *Air Transport*].

Memorandum 2<sup>65</sup> in 1984, further developing the guidelines laid down in 1979. Memorandum 1 pointed out problems with, and made suggestions concerning, State dominance of the industry, particularly pricing, safety, limited flexibility, and lack of motivation for change.<sup>66</sup> Memorandum 2 proposed more specific guidelines, addressed the impact of deregulation in the United States, focused on increased competition within the EEC air transport industry, and looked at the EEC improvements in general.<sup>67</sup> The Council of Ministers adopted neither Memorandum, however, and the ECJ, while holding the general provisions of the Treaty of Rome applicable to air transport, has given the Council of Ministers broad discretion in implementing the common transport policy.<sup>68</sup>

Undaunted, the Commission has commenced actions, based on its Treaty of Rome's article 89 powers, against various EEC airlines to force the abolition of anticompetitive bilateral agreements and practices.<sup>69</sup> Nothing to this point, however, has had the impact on the industry as has the decision of the ECJ in the *Nouvelles Frontières* case, which declared the Treaty of Rome regulations concerning competition applicable to air transport.<sup>70</sup> Where a common transport policy had failed to emerge, the substantive provisions of EEC competition law, contained in articles 85 and 86 of the Treaty of Rome, were now in place to police anticompetitive practices within the EEC air transport industry.<sup>71</sup>

As with the Chicago convention, however, application of the Treaty of Rome competition law to air transport has had little overall impact on the protectionist nature of the European air transport industry,<sup>72</sup> and has left the Commission and Council of Ministers with various unanswered questions:

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65. *Progress Towards the Development of Community Air Transport Policy*, BULL. EUR. COMMUNITIES Supp. 3/84 (Memorandum of the Commission) [hereinafter *Progress*]; Dempsey, *supra* note 9, at 657-70.

66. *Air Transport*, *supra* note 64, at 7; Dempsey, *supra* note 9, at 658; Note, *supra* note 7, at 460.

67. *Progress*, *supra* note 65, ¶ 44, at 27, ¶ 46, at 29; Dempsey, *supra* note 9, at 658-59; Note, *supra* note 7, at 461.

68. *Commission v. French Republic*, Case 167/73, 1974 E. Comm. Ct. J. Rep. 359, 371, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8720 (1974).

69. Press Releases IP (87) 343, IP (87) 614; 4 Common Mkt. Rep. (CCH) ¶¶ 10,912, 10,950; Perrott, *Regional Developments: European Communities*, 22 INT'L LAW. 1227, at 1230 (1988).

70. Judgment of Apr. 30, 1986, Case 209-213/84, *Ministère Public v. Lucas Asjes, et al.*, 4 Common Mkt. Rep. (CCH) ¶ 14,287, at 16,774 (1986) (*Nouvelles Frontières* addressed the issue of whether member nations had the right to regulate airline ticket prices after a French travel agency began selling tickets at fares not approved by the French Government). For a brief yet thorough examination of the case, see Bederman, *supra* note 40.

71. Treaty of Rome, *supra* note 10, arts. 85, 86; Bentil, *supra* note 57, at 69, 76-90; Dempsey, *supra* note 9, at 638-48.

72. Dempsey, *supra* note 9, at 656:

The *Nouvelles Frontières* case, while a philosophical victory for those seeking greater liberalization, was in fact a practical defeat. Although the court held that arts. 85 and 86 of the Treaty of Rome specifically applied to air transport, they create a right without a remedy until either the Council of Ministers adopts regulations, or the Commission issues a reason decision. Nonetheless, the decision intensified the pressure on the Council of Ministers to promulgate regulations to keep Pandora's box closed.



- (1) What exemptions should be granted to protect legitimate national interests?
- (2) What agreements, otherwise violative of the Treaty of Rome, are nonetheless desirable?
- (3) Will liberalization of the industry raise safety concerns similar to those raised by observers following U.S. deregulation?
- (4) Is there a need for a transition period in applying the Treaty of Rome to air transport?
- (5) If liberalization of the air transport industry brings continued and steady growth to the industry, how will Member States: (a) expand and improve an already overtaxed air traffic control (ATC) system; (b) find and train the pilots necessary for expansion; and (c) decide on where to construct new facilities to meet the heavy demands expansion would bring?
- (6) What will be the long-range effects and unknown costs of international terrorism against civil aviation?
- (7) To what extent will the varied labor systems within the EEC impede or affect liberalization?

After years of debate and little action, the Council of Ministers, on December 14, 1987, adopted a comprehensive package of liberalization measures for civil air transportation designed to abolish anticompetitive practices and agreements, and meet some if not all of these issues.<sup>73</sup>

### III. What Does the December 14th Agreement Do?

The December 14th agreement expressly applies Treaty of Rome rules of competition to the air transport sector.<sup>74</sup> With particularity, the December 14th agreement adopts article 87 of the Treaty of Rome, empowering and applying articles 85 and 86, on competition, to air transportation.<sup>75</sup> Articles 85 and 86

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73. 30 O.J. EUR. COMM. (No. L 374) 1-25 (1987), 3 Common Mkt. Rpts. (CCH) ¶ 2767 (the agreement includes Council Regulation (EEC) No. 975-6/87, Council Directive (87/601/87), and Council Decision (87/602/87)) [hereinafter December 14th agreement].

74. *Id.*

75. *Id.*; Treaty of Rome, *supra* note 10, art. 87 provides:

- (1) Within 3 years of the entry into force of this treaty, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, adopt any appropriate regulations or directives to give effect to the principles set out in Article 85 and 86. If such provisions have not been adopted within the period mentioned, they shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the Assembly.
- (2) The regulations or directives referred to in Paragraph (1) shall be designed in particular:
  - (a) To ensure compliance with the prohibitions laid down in Article 85(1) and Article 86 by making provision for fines and periodic penalty payments;
  - (b) To lay down detailed rules for the application of Article 85(3), taking into account the need to ensure effective supervision on the one hand, and a simplified administration to the greatest possible extent on the other;

represent the Treaty of Rome's primary "antitrust" provisions; article 85 prohibits agreements, decisions, and concerted practices, and article 86 addresses dominant market positions and abuses thereof.<sup>76</sup>

The December 14th agreement appears to finally give the EEC a workable and applicable enforcement power to promote competition within the air transport

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- (c) To define, if need be, in the various branches of the economy, the scope of the provision of Articles 85 and 86;
  - (d) To define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph;
  - (e) To determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this Article.

76. Treaty of Rome, *supra* note 10, art. 85 provides:

(1) The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decision by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction, or distortion of competition within the Common Market, and in particular those which:

- (a) Directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) Limit or control production, markets, technical development, or investment;
- (c) Share markets or sources of supply;
- (d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

(3) The provisions of Paragraph (1) may, however, be declared inapplicable in the case of

- any agreement or category of agreements between undertakings;
- any decisions or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

Which contributes to improving the production or distribution of good or to promoting technical or economic progress, while allowing a fair share of the resulting benefit, and which does not:

- (a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Treaty of Rome, *supra* note 10, art. 86 provides:

Any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market insofar as it may affect trade between member states.

Such abuse may, in particular, consist in:

- (a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) Limiting production, markets, or technical development to the prejudice of consumers;
- (c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

industry. At the same time, the December 14th agreement recognizes the particular uniqueness of EEC air transport, and some article 85(1) prohibitions are excepted or exempted (pursuant to article 85(3)) where the sole effect and objective of the offending agreement is to achieve technical improvements or cooperation that benefit consumers.<sup>77</sup>

#### A. THE PROCEDURAL PROVISIONS—COUNCIL REGULATION No. 3975/87

The scope of the December 14th agreement is to provide detailed rules for the application of articles 85 and 86 of the Treaty of Rome to a wide range of air transport services.<sup>78</sup> Nevertheless, the December 14th agreement applies only to international flights between EEC airports, and does not affect intra-State flights, or flights originating or terminating in non-Member States.<sup>79</sup> Additionally,

77. Annex to Council Regulation (EEC) No. 3975/87, 30 O.J. EUR. COMM. (No. L 374) 8 (1987), provides for the following exemptions pursuant to art. 85(3):

- (a) The introduction or uniform application of mandatory or recommended technical standards for aircraft, aircraft parts, equipment, and aircraft supplies, where such standards are set by an organization normally accorded international recognition, or by an aircraft or equipment manufacturer;
- (b) the introduction or uniform application of technical standards for fixed installations for aircraft, where such standards are set by an organization normally accorded international recognition;
- (c) the exchange, leasing, pooling, or maintenance of aircraft, aircraft parts, equipment, or fixed installations for the purpose of operating air services and the joint purchase of aircraft parts, provided that such arrangements are made on a nondiscriminatory basis;
- (d) the introduction, operation, and maintenance of technical communication that works, provided that such arrangements are made on a nondiscriminatory basis;
- (e) the exchange, pooling, or training of personnel for technical or operational purposes;
- (f) the organization and execution of substitute transport operations for passengers, mail and baggage, in the event of a breakdown/delay of aircraft, either under charter or by provision of substitute aircraft under contractual arrangements;
- (g) the organization and execution of successive or supplementary air transport operations, and the fixing and application of inclusive rates and conditions for such operations;
- (h) the consolidation of individual consignments;
- (i) the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs, provided that such rules do not directly or indirectly fix transport fares and conditions;
- (j) arrangements as to the sale, endorsement, and acceptance of tickets between air carriers (inter lining) as well as the refund, pro-rating, and accounting schemes established for such purposes;
- (k) the clearing and settling of accounts between air carriers by means of a clearing house, including such services as may be necessary or incidental thereto; the clearing and settling of accounts between air carriers and their appointed agents by means of a centralized and automated settlement plan or system, including such services as may be necessary or incidental thereto.

78. Council Regulation (EEC) No. 3975/87, *supra* note 73, art. 1, 30 O.J. EUR. COMM. (No. L 374) 2 (1987).

79. *Id.* art. 1, ¶ 2.

among the many exemptions provided, is a rather lengthy list of exemptions for technical agreements that otherwise would violate article 85(1).<sup>80</sup> Such technical agreements might include: the uniform application of standards for aircraft, aircraft equipment, or fixed installations for aircraft (where such standards are set by an international organization or by the manufacturer); the exchange, lease, or maintenance of aircraft or aircraft equipment, or the joint purchase of aircraft parts; the operation and maintenance of technical communications networks; agreements for the training of personnel for technical support; the organization of supplemental air transport operations; the fixing of rates, tariffs, and arrangements for the sale, endorsement, and acceptance of tickets between air carriers; and the clearance and settling of accounts between air carriers.<sup>81</sup>

B. EXEMPTIONS FOR THE APPLICATION OF TREATY  
OF ROME ARTICLE 85(3)—COUNCIL REGULATION 3976/87

In order to ease the transition of the EEC air transport sector toward a more competitive environment, additional exemptions are allowed to certain categories of agreements and concerted practices unique to the air transport sector.<sup>82</sup> These exemptions are transitional to the extent that the Council of Ministers must act to revise and extend the exemptions in 1990.<sup>83</sup> The exemptions include: joint planning and coordination for capacity; sharing of revenue (on a very restricted basis); consultation for common preparation of tariffs, fares, and conditions for the carriage of passengers and baggage; slot allocations and airport scheduling; common purchase and operation of computer reservation systems; ground handling at airports including refueling, cleaning, and security; the handling of passengers, mail, freight, and baggage; and services for the provision of in-flight catering.<sup>84</sup>

Important in these measures is that they must be voluntary and allow for unilateral withdrawal without penalty.<sup>85</sup> Additionally, revenue sharing agreements can be made only for compensations due to losses incurred from scheduling flights at less busy times or periods, and transfer of funds may be made in one direction only.<sup>86</sup> Notable, and a departure from past practice, is that the sharing of revenues may not exceed 1 percent of total revenue earned, after deduction of 20 percent for costs, and neither party may bear any of the other party's costs.<sup>87</sup>

80. Annex to Council Regulation (EEC) No. 3975/87, *supra* note 77.

81. *Id.*

82. Council Regulation (EEC) No. 3976/87, O.J. EUR. COMM. (No. L 374) 9 (1987).

83. *Id.* art. 8, at 11.

84. *Id.* art. 2, ¶ 2, at 10.

85. *Id.*

86. Council Regulation (EEC) No. 2671/88, *General Exemption Planning & Coordination of Air Services*, art. 3, ¶¶ 1(A), (B), 31 O.J. EUR. COMM. (No. C 138) 3 (1988); 3 Common Mkt. Rpt. (CCH) ¶ 2758.

87. *Id.* art. 3, ¶¶ 1(C), (D).

## C. SCHEDULING EXEMPTIONS—REGULATION No. 2671/88

The exemptions for negotiations and agreements for slot allocations and airport scheduling apply only if the consultations are open to all air carriers expressing an interest in such negotiations.<sup>88</sup> Rules of priority for slot allocation and airport scheduling cannot be related to nationality or category of service, but are to be applied without discrimination.<sup>89</sup>

## D. EXEMPTION FOR THE SHARING OF COMPUTER RESERVATIONS SYSTEMS—REGULATION No. 2672/88

Exemptions are also provided for the common purchase, development, and operation by carriers of computer reservation systems (CRS) for timetabling, reservations, and ticketing.<sup>90</sup> Though technically these agreements violate Treaty of Rome article 85(1), CRS agreements render useful services to carriers, agents, and most importantly passengers, by giving passengers fuller information and choice.<sup>91</sup> In recognition that few individual undertakings will be able to afford their own systems, an exemption is granted to permit sharing agreements relating to CRS use, provided such agreements remain unbiased.<sup>92</sup> Of particular concern is that such agreements not allow a parent company to create any undue advantages and thereby distort competition.<sup>93</sup> No discrimination may exist

88. *Id.* art. 5, ¶ 1(A).

89. *Id.* art. 5, ¶ 1(B).

90. Council Regulation (EEC) No. 2672/88, *Group Exemption: Computer Reservation Systems*,

31 O.J. EUR. COMM. (No. C 138) 6 (1988); 3 Common Mkt. Rt. (CCH) ¶ 2761.

91. *Id.* ¶ (3).

92. *Id.* ¶ (4); Lyle, *Computer-Age Vulnerability in the International Airline Industry*, 54 J. AIR L. & COM. 161 n.9 (1988). Two CRS conglomerates currently exist in Europe. The "Amedeus" system is owned by Air France, Iberia, Lufthansa, and SAS, with software provided by Texas Air's "System One." "Galileo" is owned by British Airways, KLM, Swissair, and United Airlines' Covia Corporation. The software system, "Apollo," is provided by Covia Corporation.

93. According to Lyle, *supra* note 92, at 165-67 (footnote omitted):

The presentation on the screen may be biased, unwittingly or deliberately, both by the scope of the inventory of flights in the system and by the priority criteria concerned. . . . [T]he examples below were . . . taken from actual airline reservation transactions observed . . . in 1987. . . .

The first example involves a trip from Montreal to Barcelona, departing Tuesday, May 12, using a CRS based in the United States. In response to entry of the origin and destination cities and the requested date, the CRS displayed the following flight information on the first "screen," edited here for ease of presentation:

Screen 1							
Listing	Airline	Flight No.	Origin	Destination	Depart	Arrive	Stops
1	Swissair	139	Montreal	Zurich	2045	1005#1	0
	Swissair	660	Zurich	Barcelona	1215	1400	0
2	KLM	674	Montreal	Amsterdam	1855	0740#1	0
	KLM	351	Amsterdam	Barcelona	1200	1405	0
3	Alitalia	647	Montreal	Rome	1515	0925#1	2
	Alitalia	356	Rome	Barcelona	1055	1235	0
#1 = next day							

There were no through flights listed between Montreal and Barcelona, and the selected "best" connection was on Swissair via Zurich, followed by a KLM connection via Amsterdam and an Alitalia connection via Rome.

The similar flight information obtained by scrolling over to the second and subsequent "screens" is summarized below:

Screen 2 (summary)		
<i>Listing</i>		
4	Montreal—	Barcelona via London Heathrow and London Gatwick (British Airways plus ground transfer to British Airways)
5	Montreal—	Barcelona via Paris Charles de Gaulle and Paris Orly (Air France plus ground transfer to Iberia)
6	Montreal —	Barcelona via Paris Charles de Gaulle and Paris Orly (Air Canada plus ground transfer to Iberia)

Screen 3 (summary)		
<i>Listing</i>		
7	Montreal—	Barcelona via New York La Guardia and New York Kennedy (Air Canada plus ground transfer to TWA)
8	Montreal—	Barcelona via Boston (Delta to TWA) "No More"

Given the absence of further flight information, the operator next "forced" the CRS to construct routings from Montreal to Barcelona over Madrid, the major hub in Spain, with the following results:

Screen 4 (summary)		
<i>Listing</i>		
9	Montreal—	Barcelona via London Heathrow and Madrid (British Airways to British Airways to Iberia)
10	Montreal—	Barcelona via Paris Charles de Gaulle, Paris Orly and Madrid (Air France plus ground transfer to Iberia)

Screen 5 (summary)		
<i>Listing</i>		
11	Montreal—	Barcelona via Amsterdam and Madrid (KLM to KLM to Iberia)
12	Montreal—	Barcelona via Zurich and Madrid (Swissair to Swissair to Iberia) "No More"

Finally the operator searched separately for Montreal/Madrid Madrid/Barcelona flights, building up the following legitimate connection:

Screen 6							
<i>Listing</i>	<i>Airline</i>	<i>Flight No.</i>	<i>Origin</i>	<i>Destination</i>	<i>Depart</i>	<i>Arrive</i>	<i>Stops</i>
13	Iberia	970	Montreal	Madrid	1830	0715#1	0
	Iberia	740	Madrid	Barcelona	0850	0950	0

between parent carrier and participating carriers to a CRS agreement.<sup>94</sup> To insure competition in what is in effect an oligopolistic market, subscribers must be allowed to switch systems on short notice, without penalty, and system vendors may not partition the market.<sup>95</sup>

#### E. GROUND SERVICES EXEMPTIONS—REGULATION No. 2673/88

Additional exemptions will be granted for ground handling services. Though technically targeted by article 85 of the Treaty of Rome, from a practical standpoint, ground service agreements produce economic benefits to both air carriers and passengers and thus help to ensure high quality services, continuity, and reasonable costs.<sup>96</sup> Ground handling services subject to exemption include: technical and operational ground handling; handling of passengers, mail, freight and baggage; and services for in-flight catering.<sup>97</sup> Restrictions on such arrangements are that there can be no mandatory exclusive dealing contracts, no tying arrangements, no arrangements designed to prevent free choice of services among carriers, no unreasonable prices or conditions, no dissimilar prices or conditions applied to equivalent transactions with different customers, and finally, users must be free to withdraw unilaterally and without penalty.<sup>98</sup>

#### F. CONDITIONS FOR DISCOUNT FARES—COUNCIL DIRECTIVE 87/601/87

To encourage flexibility and cost controls, procedures for discounting airfares are also provided by the December 14th agreement.<sup>99</sup> Applicable only to flights by Member State carriers between Member States, discounts of 90 percent to 45 percent of a reference fare are permitted.<sup>100</sup> To qualify, a flight must: pass

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By most perceptions this final listing is superior to each of the twelve previous ones. . . . [T]he departure time is similar but the origin to destination elapsed times, at nine hours and twenty minutes, is nearly two hours less than Listing 1 (Swissair via Zurich), nearly four hours less than Listing 2 (KLM via Amsterdam), and six hours less than Listing 3 (Alitalia via Rome). . . . Clearly, Iberia is highly vulnerable in this example. Unless it achieves more favorable listings of its transatlantic service with the CRS vendor concerned, the airline's access to the Montreal market and possibly other markets in which this CRS is used will be very limited.

See also Fotos, *British Airways Assails U.S. Decision to Void CRS Agreement with American*, AVIATION WEEK & SPACE TECH., Oct. 24, 1988, at 78; Commission Press Release P-103 of 26 July 1988, 14 Common Mkt. L.R. 724 [1988 Antitrust Supp.], proposing a "Code of Conduct" for CRS users.

94. Council Regulation (EEC) No. 2672/88, *supra* note 90, ¶ (5).

95. *Id.* arts. 3, 10.

96. Council Regulation (EEC) No. 2673/88, *Group Exemption: Ground Handling Services*, 31 O.J. EUR. COMM. (No. C 138) 9 (1988); 3 Common Mkt. Rpt. (CCH) ¶ 2764.

97. *Id.* art. 2.

98. *Id.* art. 1.

99. Council Directive of 14 December 1987 on Fares for Scheduled-Air Services between Member States (87/601/87), 30 O.J. EUR. COMM. (No. L 374) 12 (1987) [hereinafter Council Directive 87/601/87].

100. *Id.* art. 2. The reference fare is based on the economy fare for a particular route as established by third- or fourth-freedom carriers.

through the air space of more than one Member State; make available seats for passengers on each flight; and operate between the same two points either according to a published schedule, or so regularly as to constitute a recognizable systematic series.<sup>101</sup> Subject to certain restrictions,<sup>102</sup> carriers are then able to

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[A] third-freedom air carrier means an air carrier having the right to put down, in the territory of another state, passengers, freight and mail taken up in the state in which it is registered; a fourth-freedom air carrier means an air carrier having the right to take on, in another state, passengers, freight and mail for off-loading in its state of registration.

101. *Id.* art. 2(h)

102. *Common Market Threats Force Carriers towards Liberalization*, AVIATION WEEK & SPACE TECH., Nov. 9, 1987, at 148-49 [hereinafter *Common Market Threats*]; Council Directive 87/601/87, *supra* note 99:

#### Annex II

Conditions for discount and deep-discount fares

##### DISCOUNT ZONE

1. To qualify for the discount zone all of the following conditions must be met:
  - (a) round or circle trip;
  - (b) maximum stay of six months; and either
  - (c) minimum stay of not less than Saturday night or six nights or
  - (d) if off-peak (as defined in the Appendix) advance purchase of not fewer than 14 days, reservation for the entire trip, ticketing and payment to be made at the same time, cancellation or change of reservation only available prior to departure of outbound travel and at a fee of at least 20% of the price of the ticket.

##### DEEP-DISCOUNT ZONE

2. To qualify for the deep-discount zone, a fare must meet:
  - either conditions 1(a), (b) and (c) and one of the following conditions:
    - (a) reservation for the entire trip, ticketing and payment to be made at the same time, cancellation or change of reservation only available prior to departure of outbound travel and at a fee of at least 20% of the price of the ticket;
    - (b) mandatory advance purchase of not fewer than 14 days, reservation for the entire trip, ticketing and payment to be made at the same time; cancellation or change of reservation only available prior to departure of outbound travel and at a fee of at least 20% of the price of the ticket;
    - (c) purchase of the ticket only permitted on the day prior to departure of outbound travel, reservation to be made separately for both the outbound and inbound journeys and only in the country of departure on the day prior to travel on the respective journeys;
    - (d) passenger to be aged not more than 25 years or not less than 60 years;
  - or, if off-peak (as defined in the Appendix), conditions 1(a) and (b) together with:
    - either condition 2(b) and one of the following conditions:
      - (e) passenger to be aged not more than 25 years or not less than 60 years;
      - (f) father and/or mother with children aged not more than 25 years travelling together (minimum 3 persons);
      - (g) 6 or more persons travelling together with cross-referenced tickets; or
      - (h) mandatory advance purchase of not fewer than 28 days; reservation for the entire trip, ticketing and payment to be made at the same time; cancellation or change of reservation only available:
        - if more than 28 days before outbound travel, at a fee of at least 20% of the price of the ticket, or
        - if fewer than 28 days before outbound travel, at a fee of at least 50% of the price of the ticket.



discount airfares on scheduled air service in either a discount zone (90 percent to 65 percent of reference fare), or deep discount zone (65 percent to 45 percent of reference fare).<sup>103</sup>

G. CAPACITY SHARING AND MARKET ACCESS—  
COUNCIL DECISION 87/602/87

Finally, the December 14th agreement contains provisions for sharing of passenger capacity between air carriers of Member States, and access for EEC air carriers to certain international routes they do not already operate.<sup>104</sup> In addressing capacity sharing, the Council of Ministers has attempted to relax artificial constraints that bilateral agreements have imposed on capacity.<sup>105</sup> As such, the traditional 50-50 percent split of capacity has been replaced by a 55-45 percent split through September 30, 1989, and a 60-40 percent split thereafter.<sup>106</sup>

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Appendix

Definition of "off-peak"

An air carrier may designate certain flights as "off-peak" on the basis of commercial considerations.

When an air carrier wishes to use condition 1(d) or any of conditions 2(e) to (h), identification of the off-peak flights for each route shall be agreed between the aeronautical authorities of the Member States concerned on the basis of the proposal made by that air carrier.

On each route where the total activity of third- and fourth-freedom air carriers reaches a weekly average of 18 return flights, the air carriers concerned shall be allowed as a minimum to apply conditions 1(d) or 2(e) to (h) on up to 50% of its total daily flights, provided that the flights to which these conditions may be applied depart between 10.00 and 16.00 or between 21.00 and 06.00.

103. *Id.* art. 5.

104. Council Decision of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and access for air carriers to scheduled service routes between Member States (87/602/87), 30 O.J. EUR. COMM. (No. L 374) 19 (1987) [hereinafter Council Decision 87/602/87].

105. *Id.*

106. *Common Market Threats*, *supra* note 102, at 148; Council Decision 87/602/87, *supra* note 104, art. 3, at 19 (Shares of Capacity):

1. In the period between 1 January 1988 and 30 September 1989, a Member State shall allow any third- and fourth-freedom air carrier(s) authorized by the States concerned under the arrangements in force between them to operate routes between their territories to adjust capacity provided that the resulting capacity shares are not outside the range 55%:45%.

2. Unless a different decision is taken under Article 4, the range within which a Member State shall allow the air carrier(s) of another Member State to increase its (their) capacity share shall be extended to 60%:40% from 1 October 1989.

3. In applying the provisions of paragraphs 1 and 2, unilateral cutbacks in capacity shall not be taken into account. In such cases, the basis for the calculation of capacity shares shall be the capacity offered in the previous corresponding seasons by the air carrier(s) of the Member State which has (have) reduced its (their) capacity.

4. Adjustments within the 55%:45% range or the 60%:40% range, as appropriate, shall be permissible in any given season, under the following conditions:

(a) after the first automatic approval, the air carrier(s) of the Member State offering less capacity shall be authorized to increase its (their) own capacity

The decision also establishes opportunities for carriers to enter routes that, based on the number of passengers carried, allow for "multiple designation" on both a "country-pairing" basis and a "city-pairing" basis.<sup>107</sup> Furthermore, the decision creates additional market access between hub and regional airports.<sup>108</sup>

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up to the limit of the capacity approved for the air carrier(s) of the Member State offering the larger capacity;

- (b) if the latter air carrier(s) choose(s) to react to the above mentioned increase, it (they) shall receive automatic approval for one further increase, up the level of its (their) first capacity filing(s) for that season, within the applicable range;
- (c) the carrier(s) of the Member State offering less capacity will then receive automatic approval for one increase up to the matching level;
- (d) any further increases during that season shall be subject to the applicable bilateral provisions between the two Member States concerned.

#### Article 4

1. At the request of any Member State for which the application of Article 3(1) has led to serious financial damage for its air carrier(s), the Commission will carry out a review before 1 August 1989 and, on the basis of all relevant factors, including the market situation, the financial position of the carrier(s) and the capacity utilization achieved, will take a decision on whether the provisions of Article 3(2) should be applied in full or not.

2. The Commission shall communicate its decision to the Council which, acting by unanimity, may take a different decision within a period of two months of this communication.

107. *Common Market Threats*, *supra* note 102, at 148-49; Council Decision 87/602/87, *supra* note 104, art. 5, at 22 (Multiple Designation):

1. A Member State shall accept multiple designation on a country-pair basis by another Member State but, subject to paragraph 2, shall not be obliged to accept the designation of more than one air carrier on any one route.

2. A Member State shall also accept multiple designation on a city-pair basis by another Member State:

- in the first year after the notification of this Decision, on routes on which more than 250,000 passengers were carried in the preceding year,
- in the second year, on routes on which more than 200,000 passengers were carried in the preceding year or on which there are more than 1,200 return flights per annum,
- in the third year, on routes on which more than 180,000 passengers were carried in the preceding year or on which there are more than 1,000 return flights per annum.

3. The provisions of this Article are subject to those in Articles 3 and 4

108. Council Decision 87/602/87, *supra* note 104, art. 6 (Routes Between Hub and Regional Airports):

1. Subject to the provisions of Articles 3, 4 and 5, Community air carriers shall be permitted to introduce third or fourth freedom scheduled air services between category 1 airports or airport systems in the territory of one Member State and regional airports in the territory of another Member State. Airport categories are listed in Annex II.

2. (i) The provisions of paragraph 1 shall not apply:

- (a) to regional airports exempted from the provisions of Directive 83/416/EEC;
- (b) for the duration of this Decision to:

— the following airports which, at the time of notification of this Decision, handle fewer than 100,000 passengers per annum on international scheduled air services:

Aalborg,	Seville,
Bergamo,	Skrydstrup,
Billund,	Sonderborg,
Bologna,	Stauning,
Esbjerg,	Thisted,
Karup,	Tirstrup,
Odense,	

Finally, the decision permits the entry and operation of "fifth-freedom"<sup>109</sup>

- 
- the following airports or airport systems which at the time of the notification of this Decision meet the criteria set out in Article 9:

Barcelona,  
Malaga,  
Milan-Linate/Malpensa.

- (ii) In addition, in order to prevent major disturbance of existing air traffic systems and to allow time for adaptation, the following airports shall also be excluded from the provisions of paragraph 1 for the duration of this Decision:

Alicante, Salonica-Micra,  
Athens, Turin,  
Bilbao, Valencia,  
Genoa, Venice.

3. Articles 3 and 4 shall not apply to services between an airport in category 1 and a regional airport which are provided by aircraft with not more than 70 passenger seats.

4. Where an air carrier of one Member State has been authorized in accordance with this Article to operate a scheduled air service, the State of registration of that air carrier shall raise no objection to an application for the introduction of a scheduled air service on the same route by an air carrier of the other State concerned.

5. The provisions of this Article shall not affect a Member State's right to regulate this distribution of traffic between the airports within an airport system.

#### Annex II

##### *List of Airport Categories*

<b>Category 1</b>	Belgium:	Brussels-Zaventem
	Denmark:	Copenhagen-Kastrup/Roskilde
	Germany:	Frankfurt/Rhein-Main, Düsseldorf-Lohausen Munich-Riem
	Spain:	Palma-Mallorca, Madrid-Barajas Malaga, Las Palmas
	Greece:	Athens-Hellinkion, Salonica-Micra
	France:	Paris-Charles de Gaulle/Orly
	Ireland:	Dublin
	Italy:	Rome-Fiumicino/Ciampino, Milan-Linate/ Malpensa
	Netherlands:	Amsterdam-Schiphol
	Portugal:	Lisbon, Faro
<b>Category 2</b>	United Kingdom:	London-Heathrow/Gatwick/Stansted, Luton
	Germany:	Hamburg-Fuhlsbüttel, Stuttgart-Echterdingen, Cologne/Bonn
	Spain:	Tenerife-Sur, Barcelona, Ibiza, Alicante, Ger- ona
	France:	Marseilles-Marignane, Nice-Côte d'Azur, Lyon-Satolas, Basle-Mulhouse
	Ireland:	Shannon
	Italy:	Naples-Capodichino, Venice-Tessera, Catania- Fontanarossa
	Luxemburg:	Luxemburg-Findel
	Portugal:	Funchal, Oporto
	United Kingdom:	Manchester-Ringway, Birmingham-Edmond, Glasgow-Abbotsinch

**Category 3** All other airports officially open to international scheduled services.

Note: Category 1 airports are those traditionally referred to as "hub" airports.

109. Council Decision 87/602/87, *supra* note 104, art. 2(d): "[A] fifth-freedom air carrier means an air carrier having the right to undertake the commercial air transport of passengers, freight and mail between two States other than the State of registration."

schedule air service, subject to certain restrictions.<sup>110</sup>

The Council of Ministers' decision does not prevent Member States from concluding or maintaining arrangements more flexible than the provisions of the decision.<sup>111</sup> The decision must not, however, be used to make existing market access and capacity arrangements more restrictive.<sup>112</sup>

#### IV. Member State Preparation for Liberalization

These extensive exemptions, though some are transitional in nature, are more easily understood when the characteristics that distinguish the European airline industry from industries in other regions of the world are taken into consideration. These characteristics include government ownership, government subsidy, pooling arrangements, dissimilar labor policies, extensive nonscheduled services, and highly effective and competitive surface transportation facilities.<sup>113</sup> The role that government ownership and subsidy plays is varied, and historically has had a significant effect on both competition between carriers and earnings of individual carriers.<sup>114</sup> Governments support their national airlines for many reasons, and in many ways, including direct or indirect capital, loans, guarantees, preferential treatment, and waiver of landing and navigation charges.<sup>115</sup>

Realistically, even with exemptions, competition cannot be expected to work effectively without some controls on government aid. Absent such controls,

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110. Council Decision 87/602/87, *supra* note 104, art. 8, at 22-23, (Fifth-Freedom Rights):

1. Without prejudice to Article 6(2), a Community air carrier shall be permitted to operate a fifth-freedom scheduled air service where third- or fourth-freedom traffic rights exist, provided that the service meets the following conditions:

- (a) it is authorized by the State of registration of the Community air carrier concerned;
- (b) it is operated as an extension of a service from, or as a preliminary of a service to, its State of registration;
- (c) without prejudice to paragraph 2, it is operated between two airports at least one of which is not a category 1 airport; and
- (d) not more than 30% of the carrier's annual capacity on the route concerned may be used for the carriage of fifth-freedom passengers.

2. Subject to paragraphs 1(a), (b) and (d), Ireland and Portugal may each select one category 1 airport in each of the other Member States and may each designate an air carrier to carry fifth-freedom traffic on services between those airports, provided that neither of the air carriers so designated may exercise such rights at any one airport on more than one such route. The Member States concerned need not designate the same carrier for all routes but may for this purpose designate only one carrier to each other Member State.

3. This Article shall not apply during the period of validity of this Decision to routes to or from Spanish territory. Similarly, during the same period air carriers registered in Spain may not claim fifth-freedom rights on the basis of the provisions in this Article.

111. *Id.* art. 10(1).

112. *Id.* art. 10(2).

113. N. TANEJA, *THE INTERNATIONAL AIRLINE INDUSTRY* 58 (1988).

114. *Id.* at 59.

115. *Id.*

governments may be tempted to finance competition, and competition could become what has been described as "a subsidy race."<sup>116</sup> Fortunately, the *Nouvelles Frontières* decision and the December 14th agreement appear to have accomplished two goals: they empower the EEC to take direct action against the airlines, and they force EEC Member States to comply with, and develop, EEC regulations.<sup>117</sup> These advances should encourage more privatization of the industry, as is evidenced by a number of Member States, the United Kingdom most prominently, actively promoting change and increased privatization of State-owned airlines.<sup>118</sup>

Of interest is the IATA's shift from air coordination activities to new self-sustaining services.<sup>119</sup> Less than a decade ago the head of the legal department of the IATA presented the view that competition between scheduled carriers was not an option, and that carriers had no alternative to continued shepherding by the IATA.<sup>120</sup> The current Director General of the IATA has recognized that increased competition among IATA members is inevitable.<sup>121</sup> Among some of the new services and developments offered by the IATA are hull and liability insurance for members, and a centrally operated fares data base called Airline Industry Management Systems (AIMS).<sup>122</sup> The IATA is also in the process of developing a new currency system originally scheduled to go into effect in 1989.<sup>123</sup> Under the new system exchange rates and currency adjustment factors will be abolished, and fares will be set in the currency of the country of origin or in U.S. dollars.<sup>124</sup> Finally, to meet the demands of rapidly increasing data processing requirements, the IATA is developing a universal computer language to facilitate access between systems.<sup>125</sup>

Many individual carriers, as well, are preparing for increased competition in the EEC market. As an example, SAS and Texas Air have recently negotiated an interairline partnership agreement.<sup>126</sup> Under the terms of the agreement, SAS would take a 10 percent equity interest in Texas Air, while Texas Air Corp. would gain \$50 million from SAS as an entry level fee for access to Texas Air facilities in the United States.<sup>127</sup> As part of the agreement, Texas Air's "System One"

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116. *Id.*

117. *Id.* at 71.

118. *Id.* at 59-60, 71.

119. Shifrin, *Competitive Airline Market Spurs IATA to Develop New Services*, AVIATION WEEK & SPACE TECH., Nov. 16, 1987, at 45.

120. Forrest, *supra* note 48, at 8.

121. Shifrin, *supra* note 119, at 45.

122. Ott, *IATA Strives to Centralize Airline Tariff Information*, AVIATION WEEK & SPACE TECH., Aug. 22, 1988, at 112; Shifrin, *supra* note 119, at 45.

123. Shifrin, *supra* note 119, at 46.

124. *Id.*

125. Ott, *supra* note 122, at 112; Shifrin, *supra* note 119, at 46.

126. Ott, *SAS, Texas Air Forge Interairline Partnership*, AVIATION WEEK & SPACE TECH., Oct. 10, 1988, at 110.

127. *Id.*

computer reservation system will be merged with the "Amadeus" System operated jointly by SAS and a number of other European airlines.<sup>128</sup> As part of the agreement, SAS and Texas Air will share airline computer reservation system codes ("code sharing") allowing a flight between Scandinavia and the United States to be booked through one carrier, while having SAS as the transatlantic carrier, and a Texas Air subsidiary (Continental or Eastern) the carrier for connecting flights within the United States.<sup>129</sup> SAS and Texas Air will share ground support equipment and facilities, and SAS is expected to continue to expand its "hub-and-spoke" operations through similar partnerships or agreements in the future.<sup>130</sup>

Lufthansa, as well, has made a number of recent moves in anticipation of liberalization and increased competition in the industry. Among the most significant are the upgrade of its fleet to meet projected changes that increased competition will bring,<sup>131</sup> and its "Futura" program, developed in cooperation with Swiss Air and Iberia, for the joint training of new pilots to meet expected growth within the industry.<sup>132</sup>

## V. Parallels to U.S. Deregulation—What Can Be Expected

Many commentators have been quick to note that the uniqueness of the EEC airline industry makes a U.S. type of deregulation unrealistic.<sup>133</sup> As recent studies have shown, however, the net effect of U.S. deregulation is very far from a model of "pure" competition.<sup>134</sup> Among some U.S. deregulation attributes that a liberalized EEC industry might take on, and that might even be encouraged by the December 14th agreement and its exemptions, are:

- (1) increased mergers, resulting in a more oligopolistic or concentrated market, and the growth of "megacarriers";
- (2) expansion of the "hub-and-spoke" system;
- (3) increased pressure on airlines to reduce operating costs;
- (4) increased linking of computer-type or nonscheduled operations to major carriers;
- (5) a broader spectrum of price and service options;

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128. *Id.*

129. *Id.*

130. *Id.* at 110-11

131. *Lufthansa Sets Fleet for 1990s with Order for 737 - 500s, - 300s*, AVIATION WEEK & SPACE TECH., Mar. 28, 1988, at 91; *Common Market Threats Force Carriers Toward Liberalization*, AVIATION WEEK & SPACE TECH., Nov. 9, 1987, at 146.

132. *European Liberalization Will Raise Pilot Demand, Prompt Cooperation*, AVIATION WEEK & SPACE TECH., June 13, 1988, at 123.

133. S. WHEATCROFT & G. LIPMAN, *supra* note 40, at x; Dempsey, *supra* note 13, at 684; *see also* remarks of Commissioner Davis, Sept. 11, 1985, disapproving of a U.S. type "market free-for-all," 4 Common Mkt. Rpt. (CCH) ¶ 10,726 (1985) [hereinafter Commissioner's Remarks].

134. Levine, *supra* note 53, at 408.

- (6) a decline in the share of traffic carried exclusively by charters or nonscheduled carriers;
- (7) code sharing, and sharing of CRSs; and
- (8) significant vertical network integration of the entire industry.<sup>135</sup>

What probably will not be seen is many European countries allowing their national airlines to fail completely, especially on the scale that major carriers failed following U.S. deregulation.<sup>136</sup> As a result, if the U.S. experience with "merge or fail" is impeded by a government that will not surrender a national carrier, the national carrier may be forced to scale operations back significantly and accept being relegated to a restricted regional or intra-State role.<sup>137</sup>

Mergers between carriers of different States, creating carriers similar to SAS, may be an option, especially in distinctly defined geographic areas such as the Iberian Peninsula, where Portugal's TAP and Spain's Iberia Airlines could be merged into a truly "Iberian" airline.<sup>138</sup> In any event, the December 14th agreement, like U.S. deregulation, is not so much airline deregulation, as a step towards a type of forced oligopoly, modified for increased competition, on a scale that addresses the unique characteristics of the European airline industry.

**Congestion and Control.** An existing problem facing the European airline industry that will be aggravated by EEC liberalization will be the worsening of an already congested air traffic control (ATC) system. The existing ATC system is dangerously close to saturation,<sup>139</sup> and no significant short-term changes can be expected due to the long lead time required to initiate needed changes.<sup>140</sup> The Association of European Airlines (AEA) has characterized the European air transport system as close to stagnation, with its future in jeopardy unless improvements to the ATC system are soon made.<sup>141</sup>

As an example of the urgency of the problem, the AEA cites its own statistics for 1986 showing the length of delays for flights originating from the United Kingdom, France, and Luxembourg increasing 186 percent, and the number of delayed flights increasing 39 percent.<sup>142</sup> Additionally, there were 300,000 more European flights in 1987 than in 1986, and the number of passengers carried is expected to double by the year 2000 to reach 540 million passengers a year.<sup>143</sup> AEA figures for combined European traffic for the first three months of 1988

135. *Id.* at 423.

136. The Dallas Morning News, Oct. 23, 1988, at 1-A, col. 1, H-1, col. 6; Dallas Times Herald, Oct. 23, 1988, at A-1, A-14-15; see also Commissioner's Remarks, *supra* note 133.

137. N. TANEJA, *supra* note 113, at 105.

138. *Id.* at 75.

139. *Airlines Warn of Crippling Congestion Unless Europe Upgrades ATC Systems*, AVIATION WEEK & SPACE TECH., June 6, 1988, at 92 [hereinafter *Crippling Congestion*].

140. Lenorovitz, *Authorities Address Europe's Air Traffic Control Crisis*, AVIATION WEEK & SPACE TECH., June 6, 1988, at 86.

141. *Crippling Congestion*, *supra* note 139, at 92.

142. *Id.*

143. *Id.*

show an increase of well over 15 percent for the same period in 1987, and the trend has continued through 1989.<sup>144</sup>

To help counter the immediacy of this problem, eighteen of the twenty-two European countries belonging to the European Civil Aviation Conference recently approved wide-ranging recommendations for near- and medium-term upgrades of the ATC system.<sup>145</sup> The focus of the conference was to: develop short-term plans that can be instituted quickly, while long-range plans are being developed; ensure that EEC policies for liberalization are coherent with ATC system upgrades and operations; and attempt to reverse a trend by the IATA and other organizations of projecting unrealistically low growth rates, which historically have made planning difficult.<sup>146</sup>

**Safety.** Airline safety is also a valid concern as the EEC air transport industry is liberalized. Both the increase in competition and the integration of commuter and nonscheduled carriers following U.S. deregulation have been the focus of safety concerns by many U.S. industry observers. The period following U.S. deregulation has, however, been a period of safe operations relative to the years preceding deregulation.<sup>147</sup> Though the accident rate for large scheduled U.S. airline traffic was up slightly for 1987, 1987 was nonetheless the seventh safest year since 1926, when air safety regulation began in the United States.<sup>148</sup> Additionally, in 1987, general aviation recorded its safest year overall since 1967.<sup>149</sup> From 1970 through 1987 the U.S. air transport industry has seen seven of its safest years in the past sixty-one years, leading to the conclusion that deregulation, of itself, has not made air travel more unsafe.<sup>150</sup>

Nevertheless, the commuter airline segment of the U.S. industry has experienced a rise in its accident rate in recent years.<sup>151</sup> Among some of the factors that attributed to this increase are tighter budgetary constraints as the commuters attempt to compete with larger, established carriers, and less experience and proficiency in airline maintenance and piloting skills.<sup>152</sup> The nature of the commuter or nonscheduled carrier and its operations, however, makes the general

144. *Flight Delays Plague European Airlines as Summer Season Starts*, AVIATION WEEK & SPACE TECH., June 26, 1989, at 93; *European Airline Traffic Grows*, AVIATION WEEK & SPACE TECH., June 6, 1988, at 86.

145. Lenorovitz, *supra* note 140, at 86.

146. *Id.* IATA projected growth has been about 5.5 percent a year, Eurocontrol (European ATC authority) projections have been between 4-7 percent, while actual growth has been between 12-15 percent. See also *European Airlines Will Study Forming a Single ATC System*, AVIATION WEEK & SPACE TECH., Feb. 27, 1989, at 71 [hereinafter *Study*].

147. *U.S. Airline Accident Rate Up Slightly in 1987*, AVIATION WEEK & SPACE TECH., Jan. 25, 1988, at 150 [hereinafter *Accident Rate Up*].

148. *Id.*; *General Aviation Records Safest Year Since 1967*, AVIATION WEEK & SPACE TECH., Jan. 25, 1988, at 150 [hereinafter *Safest Year*].

149. *Safest Year*, *supra* note 148, at 150.

150. *Id.*; cf. Goetz & Dempsey, *Airline Deregulation Ten Years After: Something Foul in the Air*, 54 J. AIR L. & COM. 927, 956 (1989).

151. *Accident Rate Up*, *supra* note 147, at 150; Proctor, *FAA's Findings Reveal Commuter Airline Problems*, AVIATION WEEK & SPACE TECH., Oct. 3, 1988, at 105.

152. Proctor, *supra* note 151, at 105.



industry practice of using accident per passenger mile to compile these statistics somewhat misleading.<sup>153</sup> The commuter segment of the industry is varied, and as a general rule the commuter carrier makes far more takeoffs and landings per passenger mile (the most critical phase of any flight) than the large scheduled carrier, while operating out of smaller and more poorly equipped air fields.<sup>154</sup> Statistically, based on takeoffs and landings, U.S. commuter or nonscheduled carrier traffic is slightly less safe than that of the large scheduled carriers, but is probably not the weak link in the industry that many analysts had forecast.<sup>155</sup>

In any event, liberalization of the EEC industry is likely to increase the use by national carriers of medium- and short-haul commuter-type aircraft, and the integration of the nonscheduled carrier into the major scheduled carrier system.<sup>156</sup> If the U.S. experience is a reliable barometer of the effects of increased cooperation in the airline industry, it is apparent that the smaller carriers will have to associate themselves in some way with the major carriers to survive increased competition.<sup>157</sup> Some strong ties already exist between a number of major European carriers and regional carriers, and a number of major European airlines, faced with a more competitive industry, have either begun discussions with regional carriers for the cooperative integration of routes and schedules, or have created their own commuter units.<sup>158</sup>

Almost certainly, consolidations, mergers, and heavy vertical integration will occur within the industry,<sup>159</sup> and those medium- to small-sized carriers unable or unwilling to merge or enter cooperative agreements will, over the long haul, fail.<sup>160</sup> Existing large carriers, as well, will have to be more conscious of and sensitive to cost factors, including matching suitable configurations of aircraft to their scheduled routes.<sup>161</sup>

An increase in failures in the industry due to increased competition does not, however, necessarily mean that increased competition is "bad" or should be avoided. While a fair number of U.S. carriers, some of substantial size, failed following U.S. deregulation, entrants into the industry since deregulation have

153. Oster & Zorn, *Deregulation and Commuter Airline Safety*, 49 J. AIR L. & COM. 315, 325 (1984).

154. *Id.* at 325-26.

155. *Id.*

156. *Increased Traffic and Deregulation: A Growing Market*, AVIATION WEEK & SPACE TECH., June 20, 1988 at 61 [hereinafter *Increased Traffic*]; Levine, *supra* note 53, at 409-10; *SAS Establishes Commuter Unit*, AVIATION WEEK & SPACE TECH., Mar. 28, 1988, at 91 [hereinafter *SAS*]; *Lufthansa Plans Strategy for 1990s*, AVIATION WEEK & SPACE TECH., Nov. 29, 1987, at 148 [hereinafter *Lufthansa*].

157. *Increased Traffic*, *supra* note 156, at 62; Dempsey, *supra* note 9, at 684. *But see* Mordoff, *Aero Lloyd to Begin Scheduled Flights in Competition with Lufthansa*, AVIATION WEEK & SPACE TECH., Aug. 15, 1988, at 122.

158. *Increased Traffic*, *supra* note 156, at 62; *Lufthansa*, *supra* note 156; *SAS*, *supra* note 156.

159. Dempsey, *supra* note 9, at 684; Levine, *supra* note 52, at 409-10.

160. Levine, *supra* note 53, at 406; Dempsey, *supra* note 9, at 684-85. *But cf.* Mordoff, *supra* note 157 (former German charter carrier begins scheduled service in direct competition with Lufthansa).

161. Levine, *supra* note 53, at 407.

been able to achieve unit costs substantially below those of the carriers that failed, and even below those of holdovers from the pre-deregulation era.<sup>162</sup> In addition, although no one can predict with any certainty the effects on safety of competition between carriers that survive or enter the market, such competition will not necessarily lead to a lowering of industry safety.<sup>163</sup>

Note should be given, however, to the view expressed by Professors Dempsey and Goetz<sup>164</sup> as to the overall effects competitive pressures have had on the U.S. industry's "margin of safety."<sup>165</sup> Competitive fares and cost-cutting have increased congestion and contributed to a 21 percent increase in the average age of aircraft in service while the resources devoted to maintaining the industry's aging fleet have fallen (30 percent during the first six years of deregulation).<sup>166</sup> Placing this combination into an over-taxed ATC system may have long-term effects on safety not measurable by current statistical methods.<sup>167</sup>

A previously "lethargic,"<sup>168</sup> FAA is beginning to take a more active role in addressing this problem,<sup>169</sup> possibly in response to criticism that it is ill-equipped to handle the needs of a growing, competitive industry.<sup>170</sup> In addition to these factors, the EEC is faced with the challenge of determining which of the existing national and international entities concerned should take the lead in coordinating European efforts to maintain the "margin of safety" in a more competitive environment.<sup>171</sup>

**Mergers and Integration.** Of the numerous changes prompted by U.S. deregulation, perhaps the most dramatic trends have been toward vertical network integration, code sharing, and a rapid growth of the "hub-and-spoke" type of route system.<sup>172</sup> Vertical integration, code sharing, and "hub-and-spoke" operations are all closely intertwined and are a direct result of more competitive, and more economic, scheduling and route schemes.<sup>173</sup> This type of scheduling and route structure provided benefits for both the large and small carrier, as well as for the passenger. Hubbing provides passengers with relatively convenient connecting flights when originating or terminating a flight in an area not served by a major air facility. It also allows the large carrier to combine

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162. *Id.* at 406-07.

163. *Cf.* Oster & Zorn, *supra* note 153. *But see* Dempsey, *supra* note 9, at 684.

164. Goetz & Dempsey, *supra* note 150.

165. *Id.* at 956-58.

166. *Id.*

167. *Id.*

168. *Id.* at 956.

169. *See, e.g.,* Mecham, *FAA Hiring Field Inspectors to Monitor Aging Aircraft*, AVIATION WEEK & SPACE TECH., Apr. 24, 1989, at 110; Ott, *FAA Will Test Wayport Concept as Remedy to Airport Congestion*, AVIATION WEEK & SPACE TECH., Jan. 9, 1989, at 64.

170. *See, e.g.,* ATA President Blasts U.S. Government's Failure to Reform Aviation Agency, AVIATION WEEK & SPACE TECH., May 1, 1989, at 105.

171. As a possible step in that direction, see *Study*, *supra* note 146.

172. D. KASPER, *supra* note 4, at 30-34; Levine, *supra* note 53, at 437.

173. D. KASPER, *supra* note 4, at 30; Levine, *supra* note 53, at 439.

passengers from different points of origin while providing an economically attractive means of serving the smaller spoke cities (often through the use of vertical network agreements). Code sharing allows prospective passengers to schedule and book the entire flight under the name of one major carrier. As a result, frequent and convenient jet service is now available between paired cities whose traffic density would otherwise not support it.<sup>174</sup>

While these developments occurred in the United States as a result of market factors and economies of scale, and not necessarily as a result of any scheme conceived prior to U.S. deregulation, the December 14th agreement contains express provisions and exemptions that allow, and possibly even encourage, vertical networks, code sharing, and "hub-and-spoke" route systems.<sup>175</sup> A major aspect of the December 14th agreement is that it provides through article 85(3) exemptions sufficient flexibility across the board to allow for agreements that, while flying in the face of a pure competition model of industrywide deregulation, are both beneficial and necessary when considering the varied economic and social factors facing the EEC in making the air transport industry more competitive.<sup>176</sup> In addition, unlike the U.S. experience,<sup>177</sup> the December 14th agreement, as implemented by the EEC,<sup>178</sup> takes steps to preserve entry level opportunities and avoid excessive market dominance at hub facilities; something that unrestricted competition might otherwise foster.<sup>179</sup> The overall effect should be the avoidance of absolute regional dominance by existing carriers—something that has limited market entry in the United States<sup>180</sup>—that would ultimately limit the gains sought by increased competition

## VI. Conclusion

Due to the diversity within the EEC and the many factors that distinguish it from the United States, care must be taken in any comparison of U.S. deregulation and the liberalization of the EEC air transport industry. In addition, the EEC's target date of 1992 for the creation of a unified internal market and Single European Act, pose constraints on industry liberalization probably not

174. Levine, *supra* note 53, at 441.

175. See *supra* notes 89-90, 103-07 and accompanying text.

176. See *supra* notes 74, 79-95, 101-07 and accompanying text.

177. Goetz & Dempsey, *supra* note 150, at 931-43; Ott, *Senate Panel Widens Probe of Airline Concentration*, AVIATION WEEK & SPACE TECH., June 12, 1989, at 312; *Skinner Calls USAir in Bid for More Philadelphia Gates Anti-Competitive*, AVIATION WEEK & SPACE TECH., June 5, 1989, at 110; Ott, *Congress Seeks Remedies to Concentration at Hubs*, AVIATION WEEK & SPACE TECH., May 8, 1989, at 100; Meham, *Justice Dept. Vows Stronger Antitrust Policy on Mergers*, AVIATION WEEK & SPACE TECH., Mar. 13, 1989.

178. *Common Market Begins to Wrestle With Rules to Govern Competition*, AVIATION WEEK & SPACE TECH., June 12, 1989, at 93-95 (Commission has required the forfeiture to small carriers of landing slots and routes as a condition to merger approval).

179. See *supra* note 177.

180. *Id.*

present in any form in the U.S. industry experience.<sup>181</sup> While the deregulated U.S. industry has undoubtedly experienced an increase in efficiency, some interesting deviations from a pure competition model have emerged, including complex fare structures, extensive use of CRS, extensive vertical integration, and "hub-and-spoke" domination.<sup>182</sup> The EEC, through the December 14th agreement, appears to have allowed for these deviations, recognizing them as important and inevitable in implementing a plan calling for increased competition, while at the same time guarding against some of the less desirable effects pure competition might encourage. The agreement also seems to address the varied economic and social conditions within the EEC's Member States, the EEC air transport industry, and the effect these differences might have on liberalizing the industry and promoting competition.

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181. Creation of Internal Market, 1 Common Mkt. Rep. (CCH) ¶ 202.07 (1978); Single European Act, 1 Common Mkt. Rep. (CCH) ¶ 101.15 (1978).

182. Levine, *supra* note 53, at 408.